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Docket No. 95-1565

In the Supreme Court
of the United States

October Term 1995

DONALD CARSON, Petitioner,

- versus -

WATERFRONT COMMISSION OF NEW YORK HARBOR, Respondent.

REPLY TO THE OPPOSITION

TO THE PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Third Circuit to review its judgment at Docket Number 95-5309

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REPLY TO THE OPPOSITION TO CERTIORARI

1. The § 504(d) salary escrows would have been established but for the Waterfront Commission's interference. Respondent makes the curious argument that because it interfered with the establishment of § 504(d) salary escrows by forcing Mr. Carson's removal from office shortly before the triggering event of sentencing, "no rights ever inured to Carson under that provision." Respondent's Opposition ("Opp.") 13.

> Clearly, Carson was barred from his positions in the waterfront unions solely by virtue of WCA § 8. Since this bar did not arise "by operation of" 29 U.S.C. § 504, no escrow obligation ever arose under 29 U.S.C. § 504(d). [Opp. 13, emphasis in original.]

Petitioner sued precisely because his right to the establishment of salary escrows never inured. But for the Waterfront Commission's conduct, it would have inured, for he would have been removed from office by operation of § 504

upon sentencing.

Put differently, Mr. Carson did not sue the Waterfront Commission for failing to establish the salary escrow -- something it was never obligated to do. Rather, Petitioner complains that the Waterfront Commission's actions tortiously interfered with his prospective economic advantage by acting in an unprecedented manner designed to relieve his union employers of the § 504(d) duty to establish salary escrows. The parties do not dispute that unless the Waterfront Commission acted within its lawful authority, it committed an actionable wrong and the Complaint should not have been dismissed for failure to state a claim.

2. The Waterfront Commission acted on a claimed removal authority enacted <u>after</u> Congress approved the Compact. At Opp. 1, the Commission claims it "is vested with authority by N.J.S.A. 32:23-80; N.J.S.A. 32:23-80.2 (WCA § 8) to remove

any 'officer, agent or employee' of a waterfront labor organization" upon conviction. Any removal authority that can be inferred from those statutes is based on enactments passed subsequent to Congress' consent to the Compact.

Specifically, N.J.S.A. 32:23-80 as originally enacted in 1953 merely contained prohibitory language against collection of dues by unions whose officers had been convicted. It was amended in 1962 to provide additionally for criminal sanctions, but not for direct removal. N.J.L. 1962, c. 5, § 3. N.J.S.A. 32:23-80.2, which is directed at convicted officers and empowers the Commission to bring a civil action in the Superior Court of New Jersey to effect removal, was enacted at the same time. N.J.L. 1962, c. 5, § 5(8-b). See International Longshoremen's Association (Gardner) v. Waterfront Commission, 495 F.Supp. 1101, 1107-1108 (S.D.N.Y. 1980) (reviewing New York's parallel § 8

amendments), affirmed, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966 (1981).

Thus, the specific statutory language upon which Respondent relied when it demanded Mr. Carson's removal from office was enacted years after Congress gave its consent to the Compact. The Waterfront Commission is therefore wrong when it challenges Petitioner's view "that Congress improperly signed a legislative 'blank check' when it gave its consent to [future enactments furthering] the Waterfront Commission Compact." Opp. 4. Precisely because the Waterfront Commission relies on language not found in the original § 8, it is mistaken when it maintains that "[t]he very foundation of [Petitioner's] argument is flawed in that WCA § 8 had already been enacted by New Jersey and New York and was before Congress in 1953." Opp. 4. While the original § 8 had indeed been approved in 1953, the § 8 that Congress had approved merely barred unions led by convicts from

collecting dues; it gave the Waterfront Commission no authority whatsoever to remove the convicted union officer.

3. The post-Congressional-consent State enactment of a purported power to force removal of convicted officers should be tested against the doctrine which emerged in the Chadha line of cases. The Petition urged this Court to determine whether Congress has the constitutional power to authorize individual States to effectively amend interstate compacts without further congressional consent. The very fact that the Waterfront Commission claims removal authority on the basis of post-consent enactments puts into sharp focus the need for and appropriateness of inquiry under the line of cases springing from INS v. Chadha, 462 U.S. 919 (1983).[1]

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1. The court of appeals made no mention of the Chadha issue in its decision, although it was raised by Petitioner in his Brief and his Reply Brief.

Respondent does not acknowledge the presence of a Chadha issue. Instead, as already demonstrated, it pretends that the § 8 in place when Congress gave consent is the same § 8 in force when the Waterfront Commission acted against Mr. Carson. On that false foundation it would read the Chadha issue out of the Petition.

Certainly whether the Compacts Clause gives Congress, when consenting to an interstate compact, the power to give a blanket approval to future State "enactments in furtherance thereof," 67 Stat. 541, P.L. 83-252 (1953), is an important issue concerning constitutional federalism that is deserving of this Court's attention. After all, given that "congressional consent transforms an interstate compact within the Clause into a law of the United States," Cuyler v. Adams, 449 U.S. 433, 437 (1981), the "enactments in furtherance" language in

the approval of the Waterfront Commission Compact purports to delegate powers vested in Congress to the State legislatures, allowing them to amend federal law. Such a delegation of congressional power is wholly inconsistent with the Constitution as construed in the Chadha line of cases.

4. **Prior to the 1984 amendments to 29 U.S.C. § 504, the Commission never sought removal of a union officer before sentencing.** At Opp. 12, Respondent asserts (emphasis in original):

> Carson's claim that he was singled out for WCA § 8 removal prior to sentencing is belied by the fact that in 1988 the Commission had the benefit of the Local 1804 and Scotto cases, as well as the determination of the Second Circuit in International Longshoremen's Association [Gardner] v. Waterfront Commission. * * * Those cases, which predated the 1988 WCA § 8 removal of Carson by many

> years, as noted, uniformly held that "conviction" under WCA § 8 occurs upon the entry of a plea of guilty or upon the return of a guilty verdict at the trial court level.

Each of the three cases invoked by the Waterfront Commission does stand for the proposition that "conviction" means return of a guilty verdict under State law. However, in each of those cases, Respondent did not seek removal until after sentencing. International Longshoremen's Association (Gardner) v. Waterfront Commission, 495 F.Supp. 1101, 1105 (S.D.N.Y. 1980) (at issue is "whether certain union officials, recently sentenced after trial, should be forced out of their union jobs now rather than after their appeals have been exhausted"), affirmed, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966 (1981); Local 1804, ILA (Cashin) v. Waterfront Commission, 171 N.J.Super. 508, 509, 410 A.2d 73 (App. Div. 1979) (guilty verdict

on April 11, 1978; letter from Waterfront Commission demanding removal on July 3, 1978), affirmed, 85 N.J. 606, 428 A.2d 1283 (1981); Scotto v. Waterfront Commission, No. 5580/80, Slip 2-3 (Sup. Ct.) ("On January 22, 1980, the date that Scotto was sentenced, the General Counsel of defendant Waterfront Commission sent a letter to him" asserting, "'Your convictions are within the purview of Section 8 ...'"), appeal dismissed, 434 N.Y.S.2d 1004 (App. Div.), appeal denied, 50 N.Y.2d 709, 415 N.E.2d 984 (1980).

While New Jersey and New York local law undoubtedly views a guilty verdict as a "conviction," even if it is never reduced to judgment or is ultimately overturned, the fact remains -- and Respondent does not and cannot dispute -- that in every prior case of the Waterfront Commission's demanding removal of a union officer, no demand was ever

made until after sentencing.

Therefore, given the Rule 12(b)(6) posture of this proceeding, it must be assumed that the Commission's seeking Mr. Carson's removal from office before sentencing, an arbitrary change from its consistent prior practice, was undertaken with the specific purpose of defeating Petitioner's prospective interest in 29 U.S.C. § 504(d) salary escrows.

Accordingly, this Court should determine whether Petitioner states a claim upon which relief can be granted when he asserts that a governmental agency established under an interstate compact acts ultra vires, and in derogation of the Supremacy Clause and the procedural and substantive requirements of the Due Process Clause of the Fourteenth Amendment, when it changes its usual behavior in order to defeat accrual of federal statutory benefits.

5. If WCA § 8 is a part of federal law, "conviction" in § 8 should be construed as it is defined in 29 U.S.C. § 504(c)(1) and consistent with Criminal Procedure Rule 32; if § 8 is not federal law, the State definition accepted below should be tested against the Supremacy Clause. Respondent closes its opposition with the following sentence (Opp. 16): Even if WCA § 8 is deemed federal law (Carson Petition, pp. 27-29), it has not in any way been repealed by necessary implication by the 1984 amendment to 29 U.S.C. 504, Rodriguez v. U.S., 480 U.S. 523, 107 S.Ct. 1391, 1392 (1987)."

Petitioner is not arguing any repeal by implication. Those words do not appear in the Petition.

Petitioner does maintain that De Veau v. Braisted, 363 U.S. 144 (1960) should not control, because in that case federal labor law and the Compact worked toward a common end. In this case, the addition of § 504(d) to federal labor law created

an inconsistency with the Compact's purpose, for § 504(d) is not intended to end union corruption, but rather to benefit the wrongly convicted, such as Petitioner.

Moreover, Petitioner maintains that if § 8 is to be deemed a part of the Waterfront Commission Compact to which Congress consented in 1953, as this Court held in De Veau, then it must be construed as federal rather than State law because Congressional consent transformed the Compact into federal law. NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission, 732 F.2d 292, 298 (2d Cir.) ("we hold that the consent of Congress transformed the Compact into federal law"), cert. denied, 469 U.S. 852 (1984). See generally, Cuyler, supra, 449 U.S. at 438-440.

Therefore, (1) all of the decisions holding that for purposes of WCA § 8, "conviction" means return of a guilty verdict -- Scotto, Cashin, Gardner, and

the decision below -- mistakenly relied on irrelevant State decisions while disregarding federal authorities; and (2) as a matter of federal construction, it would be absurd in the extreme for Congress to carefully define "conviction" in § 504(c)(1), and to make that definition consistent with Federal Rule of Criminal Procedure 32, while intending the same term in § 8 to mean something totally different. That absurdity is exacerbated when making a guilty verdict tantamount to a conviction would defeat the salary escrow requirement of § 504(d) for those wrongfully convicted union officials who happened to be subject to the Waterfront Commission's jurisdiction.

Conversely, if this Court were to abandon De Veau's view that § 8 was the subject of congressional consent, and thereupon hold that it is purely State legislation subject to State rules of construction, a Supremacy Clause problem inevitably arises. It arises because § 8

(as construed and applied by the Waterfront Commission) clearly interferes with the operation of subsequent federal legislation. See, e.g., Rose v. Arkansas State Police, 479 U.S. 1, 3 (1986) (per curiam).

These constitutional questions disappear if the term "conviction" in § 8 must be defined by reference to federal rather than State law -- something the courts below and the State courts have refused to do, notwithstanding Cuyler and NYSA-ILA Vacation & Holiday Fund.

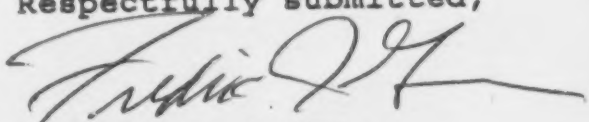
In light of the manifest inconsistency between NYSA-ILA Vacation & Holiday Fund, holding that the Compact is federal law, and the decisions in Gardner, Scotto, Cashin, and below, holding that § 8 is to be construed under State law, this Court should definitively resolve (1) whether "conviction" for purposes of WCA § 8 is to be defined by reference to State or federal law, and (2) whether any definition inconsistent with the

definition in § 504(c)(1) can survive scrutiny under the Supremacy Clause, the Compacts Clause, and the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons and those previously stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit at Docket Number 95-5309.

Respectfully submitted,



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May 5, 1996.